Supreme Court, U.S.
FILED
SEP 30 1999
OFFICE OF THE CLERK

(2)

No. 99-424

IN THE UNITED STATES SUPREME COURT

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,

Petitioners,

UNITED STATES OF AMERICA

Intervenor,

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

Burton Craige
Counsel of Record
Melinda Lawrence
PATTERSON, HARKAVY & LAWRENCE, L.L.P.
Post Office Box 27927
Raleigh, North Carolina 27611
Telephone: (919) 755-1812

Robert Joseph Antonello
Robert G. Fegers
ANTONELLO, FEGERS & CEA
Post Office Box 7692
Winter Haven, Florida 33883
Telephone: (941) 294-2898

COUNSEL FOR PETITIONERS

488

SUPPLEMENTAL REASON FOR GRANTING THE WRIT

On September 8, 1999, Petitioners/Plaintiffs ("Plaintiffs") filed the pending petition for writ of certiorari, seeking review of the Fourth Circuit decision, Brown v. North Carolina Division of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) ("Brown"). In Brown, the Fourth Circuit considered Plaintiffs' claim that a North Carolina law requiring persons with disabilities to pay a $5.00 fee for a parking placard violates the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq. ("ADA") and its implementing regulation, 28 C.F.R. § 35.130(f). The Fourth Circuit rejected Plaintiffs' challenge to the placard fee, holding that 28 C.F.R. § 35.130(f) was not a constitutionally valid exercise of Congress' power to enforce the Fourteenth Amendment.

On September 16, 1999, the Ninth Circuit Court of Appeals issued its decision in Dare v. State of California, No. 97-56065, 1999 WL 717724 (9th Cir. Sept. 16, 1999), holding that California's $6.00 biennial fee for disability parking placards violates the ADA and 28 C.F.R. § 35.130(f). The Ninth Circuit decision is in direct conflict with Brown.

In Dare, the defendant State of California, while acknowledging the constitutionality of Title II of the ADA, claimed that "the prohibition in 28 C.F.R. § 35.130(f) against states charging even de minimis administrative fees violates the Fourteenth Amendment." 1999 WL 717724 at *7. The Ninth Circuit rejected California's argument:

> The primary flaw in the government's approach is that it conducts its Fourteenth Amendment analysis in a piecemeal manner. Because the statutory scheme as a whole

constitutes a proper exercise of Congress' power to legislate under § 5, see Clark [v. California], 123 F.3d at 1270-71, regulations promulgated pursuant to the ADA "must be given 'legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute.'" Does 1-5 [v. Chandler], 83 F.3d at 1153 (quoting United States v. Morton, 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984)).

Here, the regulation is not arbitrary, capricious, or contrary to the ADA. See id. Title II protects the rights of disabled people to have the same public services, programs, and activities as those who are not disabled. See 42 U.S.C. § 12132. If public entities place a surcharge on measures that help disabled people achieve this parity, disabled people then are paying fees others do not and so are not being treated equally.

Forbidding such additional charges is a solution aimed at preventing this type of discrimination; it addresses the improper approach to funding services for the disabled, see 28 C.F.R. § 35.130(f), while leaving states broad flexibility to administer and fund their programs otherwise, cf. Duprey v. State of Conn., Dept. of Motor Vehicles, 28 F.Supp.2d 702, 708 (D.Conn. 1998) ("If the DMV wants to pass on the costs of providing placards,

> rather than absorbing the costs itself, it must pass the cost on to all parkers, and not just those disabled individuals protected by the ADA."). The rationale for this regulation thus dovetails neatly with the purposes of Title II. We therefore hold that 28 C.F.R. § 35.130(f) has controlling weight.

Id. at *7-8 (footnote omitted).

The Ninth Circuit considered and expressly rejected the Fourth Circuit's reasoning in Brown:

> In taking this approach, we reject the reasoning of the Fourth Circuit in Brown, which determined that "separation of powers, administrability, and federalism" required an examination of "the legality of the specific statute and regulation whose asserted violation by the state government gave rise to the claim for relief in federal court." Brown, 166 F.3d at 705. In our view, a piecemeal analysis of the regulations would unduly constrain Congress's power to construct a statutory scheme addressing discrimination; the federal courts, in effect, would have a line-item veto over legislation directed at intentional or arbitrary discrimination by the states.

Id. at *7, n. 7 (emphasis added).

The Ninth and Fourth circuits now stand in direct conflict on an important issue regarding the proper balance between judicial and Congressional power. The first question in the pending petition for writ of certiorari squarely presents the issue. Plaintiffs respectfully request the Court to grant the petition so that the conflict may be resolved.

September 30, 1999

Burton Craige
Counsel of Record
Melinda Lawrence
PATTERSON, HARKAVY &
LAWRENCE, L.L.P.
Post Office Box 27927
Raleigh, North Carolina 27611
Telephone: (919) 755-1812

Robert Joseph Antonello
Robert G. Fegers
ANTONELLO, FEGERS & CEA
Post Office Box 7692
Winter Haven, Florida 33883
Telephone: (941) 294-2898

COUNSEL FOR PETITIONERS